IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.16 OF 1993

Ramesh Gajadhar Tiwari,
Age 24 years, Occ: Nil,
at present in Yeravada
Central Prison. .... Appellant

- Versus -

The State .... Respondent

Sarvasri Shirish Gupte with S.V. Kotwal
for the Appellant.

Shri B.H. Mehta, Addl. Public Prosecutor,
for the Respondent-State.

CORAM: R.M.S. KHANDEPARKAR &
R.S. MOHITE, JJ.

DATED: AUGUST 3, 2004

ORAL JUDGMENT (Per R.S. Mohite, J.):

1. The appellant/original accused No.1 (hereinafter referred to as "accused No.1") has preferred this appeal against his conviction for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as "the IPC") and the consequent sentence of imprisonment for life and payment of fine of Rs.5,000/-, in default to undergo R.I. for one year, imposed upon him by the 8th Addl. Sessions Judge, Pune vide the impugned judgment and order dated 2-12-1992 passed in Sessions Case No.268 of 1991.

2. The brief facts of the prosecution case are as under:-

A. That the deceased Siddappa Koli was the real brother of PW-2 Siddamma Koli. He was residing along with PW-2 Siddamma, father Narsappa, his wife Laxmi, younger sister Devamma and the daughter of Siddamma at Pandu Laxman Vasti, situated at Yervada, Pune. The original accused No.2 Jatashankar Tiwari was a person who had a house situated two houses away from the house of the deceased. The deceased Siddappa used to deal in the sale of maize on a handcart by moving through the lanes and roads. The incident in question occurred on 30-7-1989. While taking his handcart for sale of maize, the deceased had to pass in front of the house of the original accused No.2 Jatashankar. On earlier occasions whenever the deceased took his handcart from the front of the house of the original accused No.2, a wooden rafter from the ceiling of the roof of the house of accused No.2 used to obstruct the tin roof of the handcart, thereby damaging the said roof of the handcart. The deceased Siddappa used to always tell the accused Jatashankar to remove the said wooden rafter but the accused Jatashankar used to turn a blind eye to his plea. On 30-7-1989, at about 1:30 noon, while the deceased Siddappa was taking his handcart, the same hit the protruding wooden rafter on the house of the accused

Jatashankar. This resulted in a quarrel between the deceased and Jatashankar. Somebody rushed to the house of the deceased and informed about the quarrel. PW-2 Siddamma and Laxmi, the wife of the deceased rushed towards the spot. They found that the deceased was asking Jatashankar to remove the wooden rafter on the roof of his house and Jatashankar was refusing to do so. During this quarrel, the deceased Siddappa told Jatashankar that if he would not remove the rafter from the roof, he would personally remove the said rafter and by saying so, the deceased Siddappa removed the offending rafter on the roof of the house of Jatashankar by his own hand. This resulted in a scuffle between the deceased and Jatashankar. PW-2 Siddamma and Laxmi who had rushed to the spot tried to separate the quarrel but she was pushed down by her own brother while making an attempt to rescue him. In the meanwhile, the original accused No.3 Anantram Shukla came there and according to Siddamma, assaulted her brother Siddappa on his head with the broken piece of the rafter which had been removed by the deceased Siddappa. Accused No.1 then arrived at the spot and he gave a single stab blow with a knife on the right side of the chest of deceased Siddappa. According to PW-2 Siddamma, after the inflicting of this stab injury all the accused ran away. Siddamma then rushed to the police chowky of Yervada and reported the incident to the police. Some persons

removed Siddappa to Sassoon Hospital and where he was admitted. He died after 3-4 days.

B. It appears that Siddamma was in a hurry to go to the hospital because her brother was injured and therefore her statement was not immediately reduced to writing. The police officer himself rushed to the spot of the incident. He left a police constable on the spot to guard the spot and rushed to the Sassoon Hospital where the deceased was admitted in a injured condition. He found that the deceased was unconscious and therefore he could not record his statement. He then recorded the FIR (Exhibit-18) as narrated by Siddamma at the Sassoon Hospital. On the basis of this complaint he registered the offence bearing C.R.No.220/89 initially under Section 307 r/w Section 34 of the IPC. The said offence was later converted under Section 302 on the death of the deceased Siddappa. The investigating officer then returned to the spot of the offence and drew the spot panchnama (Exhibit-21); he collected the sample of blood stained earth from the spot of the offence; the piece of wooden rafter lying on the ground was also seized by him (Article-3); he arrested the original accused Nos.1 to 3 about 5:00 p.m. on the same day under an arrest panchnama (Exhibit-35); he recorded the statements of the other witnesses including the eye-witness PW-3 Smt. Ramnama Gorat. The wife of the

deceased Siddamma produced the blood stained clothes of the deceased which were seized under a panchnama (Exhibit-28). He found that the original accused No.2 Jatashankar had an injury on his head and the said accused was therefore referred to the Sassoon Hospital for medical treatment. The accused Jatashankar had also lodged a complaint (Exhibit-36) against the deceased Siddappa and the investigating officer, on the basis of the said complaint, registered a N.C. against Siddappa. On 2-8-1989 Siddappa expired in the hospital. The investigating officer then proceeded to the Sassoon Hospital and drew the inquest panchnama of the dead body. He sent the dead body for post-mortem. He collected the blood sample of the deceased and seized the clothes on the person of the accused. On 3-8-1989 the appellant/accused No.1 showed his willingness to make statement which could lead to the discovery of the knife used during the assault. The said statement was recorded under a panchnama. Consequent to the said statement, the knife was discovered in the house of the accused No.1. The said knife was seized and was Article-6 before the Court. On 3-8-1989 the investigation of the case was handed over by this witness to Police Inspector Deshmukh. The blood sample of the accused were then collected at the instance of PI Deshmukh. Various articles seized were sent to the chemical analyser and ultimately on 26-10-1989 the

chargesheet came to be filed in the Court of the J.M.F.C., Pune.

3. After the committal of the case to the Court of Sessions, the trial Court framed a charge under Section 302 r/w Section 34 of the IPC. There was also a charge for violation of Section 37(1) r/w Section 135 of the Bombay Police Act. The prosecution, in order to prove its case against the accused, examined in all eight witnesses. PW-2 Siddamma and PW-3 Ramnama were the two eye-witnesses to the said incident; PW-4 Ramesh Chavan was the panch in respect of the scene of offence, PW-5 Tirupati Valekar was the panch witness before whom the discovery statement was made by accused No.1 and the panchnama relating to the recovery of the knife, said to have been discovered. PW-6 Suresh Rathod was the panch in respect of seizure of the clothes from the accused Nos.1 to 3. PW-1 Dr. Mazhar Khan was examined by the prosecution to prove the nature of the injury caused to the original accused No.2. PW-7 Dr. Kaushik Durgesh was examined in order to prove the injuries suffered by the deceased. This witness was also examined to prove the post-mortem notes. PW-8 was the investigating officer.

4. Though the defence examined no defence witnesses, the defence’s version can be gathered from the

suggestion made to the eye-witnesses as well as from the 313 Cr.P.C. statement recorded by the trial Court.

5. In his 313 statement, the accused No.1 stated that at about 1:30 p.m. on 30-7-1989 he had finished his meal at the house of the accused No.2 Jatashankar and was washing his hands. That the wife of the accused No.2 along with her children were present inside the house at that time. At that time he heard cries of accused No.2 Jatashankar coming from outside the house asking persons to save him. The accused No.1 rushed outside and noticed the deceased Siddappa assaulting the accused No.2 Jatashankar with a broken piece of wooden rafter. The deceased Siddappa by the said assault caused a bleeding injury on the head of the accused No.2. He noticed that the deceased was repeating the assault with the wooden rafter and hence the accused No.1 rushed there and caught the hand of Siddappa in which he was holding the wooden rafter. The wooden rafter then fell on the ground. Siddappa then took a knife from his right pocket. Siddappa was heavily drunk. The accused No.1 caught hold of the hand of Siddappa in which he was holding the knife. Both of them fell down on the ground and that some persons came there and pelted stones. In the 313 statement of the accused No.2 Jatashankar, he stated that at about 1:30 p.m. on 30-7-1989 the deceased Siddappa came in front

of his house and called him out and was giving abuses and at this time the accused No.1 was in his house taking meal in the kitchen and the accused No.3 was in another room. The accused No.2 came out of the house and asked Siddappa as to why he was giving abuses. Siddappa asked him to remove the rafter voluntarily or to allow him to remove the same and that he wanted to take his handcart through the lane. The accused No.1 asked him to wait till the carpenter was called but the deceased got angry and pulled down the rafter, breaking it into two pieces. He assaulted the accused No.1 with one piece of wooden rafter on his head and caused bleeding head injury to accused No.2. At that moment accused No.1 arrived there and while accused No.2 was making a complaint about the beating given to him by the deceased, PW-2 Siddamma also arrived at the police chowky to lodge her complaint.

6. Ultimately after considering all the evidence and material on record, the trial Court partly disbelieved the version given by the prosecution witnesses. The trial Court, however, partly believed the prosecution witnesses and while acquitting accused Nos.2 and 3 of all the charges, convicted accused No.1 for the charge under Section 302 of the IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5000/-, in default to undergo R.I. for one year.

He, however, acquitted the accused No.1 for the charges under Section 37(1) read with Section 135 of the Bombay Police Act.

7. With the assistance of the counsel we have perused the entire evidence. The foundation of the prosecution case rests on the evidence of the eye-witnesses PW-2 Siddamma and PW-3 Ramnama. Siddamma is the real sister of the deceased. She states in her evidence that at about 1:30 p.m. somebody came to their house and told them that a quarrel was going on between her brother and the accused No.2 Jatashankar. She rushed to the spot which is situated just two houses away and found her brother Siddappa asking accused No.2 to remove the wooden rafter of the ceiling. Siddappa told the accused No.2 that if he did not remove the rafter from the ceiling, he would personally remove the rafter and after saying so, he proceeded to remove the rafter of the ceiling of the house of Jatashankar with his own hands. The net result of this was that the abusing which was going on turned into a scuffle between the deceased and the accused No.2. PW-2 Siddamma and Laxmi, the wife of her brother, tried to rescue her brother from accused No.2 but her brother pushed her on the ground. Meanwhile, the accused No.3 Anantram Shukla came there and assaulted the deceased Siddappa on the head with the broken piece of the rafter. Immediately after the

assault by the accused No.3 on the head of the deceased Siddappa, the accused No.1 arrived on the spot and he gave a stab with a knife on the right part of the chest of her brother. After infliction of the stab injury several persons gathered on the spot and all the accused rushed away. In her cross-examination this witness stated that she did not know how the accused No.2 received the injury on her head. She stated that she did not know if the said injury was caused by a wooden rafter which had been pulled by her brother from the roof of the house of the accused No.2 Jatashankar. She stated that the quarrel might have lasted for an hour. In her cross examination, this witness volunteered that her brother had fallen on the ground when the accused No.1 had come there with a knife and it was in this position that the accused No.1 assaulted her brother on the chest. She stated that her brother Siddappa fell on the ground after being assaulted on the head by the accused No.3. She denied that there was any wooden rafter in the hand of her brother when he fell on the ground. She claimed that when the accused No.3 assaulted her brother with the wooden rafter, she pushed accused No.3 due to which he was pushed back for a distance of about 5-6 feet and when she turned back she noticed that accused No.1 was holding a blood stained knife in his hand and he had assaulted the deceased on the chest.

8. In so far as PW-3 Ramnama is concerned, this witness was a neighbour of the deceased. She states that at about 1:30 p.m. on 30-7-1989, she had come out of her house after lunch and had noticed that accused No.2 and Siddappa were quarrelling with each other. The quarrel was on account of the deceased removing the rafter from the house of the roof of the accused No.2. Siddappa then personally removed the rafter by pulling it with his hands and the rafter was broken into pieces. This resulted in a scuffle between the deceased and the accused No.2 Jatashankar. PW-2 Siddamma and Laxmi, the wife of the deceased Siddappa arrived at the spot and they were trying to separate the deceased and the accused No.2. Thereafter accused No.3 arrived from the house of the accused. He picked up a broken piece of the rafter lying on the ground and he assaulted with the said rafter on the head of the deceased Siddappa. Due to the assault at the hands of the accused No.3, Siddappa fell down on the ground. Thereafter the accused No.1 came to the spot from the house of the accused No.2. He came running and was holding a knife in his hand. The accused No.1 stabbed with the knife on the chest of Siddappa who was lying on the ground. Due to the stabbing, a bleeding wound was caused on the chest of deceased Siddappa. Thereafter all the three accused went inside the house of the accused and while

making the entry in the house of the accused No.2, accused No.2 suffered an injury on his head as his head hit the wooden frame of the door of his house. Thereafter the accused No.2 Jatashankar again came out of his house and ran away. Some boys from the locality took the deceased Siddappa to the Sassoon Hospital.

9. In so far as the medical evidence is concerned, the prosecution has examined PW-7 Dr. Kaushik Durgesh to prove the injuries caused to the deceased and to prove the post-mortem notes. From the evidence of this witness it appears that the deceased had suffered one single external injury which was in the nature of a stab injury and cut incised wound in the right 7th intercostal space, oblique in direction, 4 cm x 1 cm in dimension. He stated that its depth could not be gauged but it was quite deep probably intrathoracic or intra abdominal. He found blood in the plural cavity. There was a cut in the diaphragm, liver and there was a lung tear and there was a cut on the posterior abdominal wall 1 cm long. The prosecution then examined PW-1 Dr. Mazhar Khan, who was the doctor attached to the Sassoon Hospital, Pune and who had examined the accused Jatashankar. In his evidence the doctor has stated that the nature of the injury suffered by the accused No.2 Jatashankar was a contused lacerated wound, mid-parietal region, obliquely placed of dimension 3 cm x 1/4th cm

with oozing of blood. In his cross-examination the doctor has stated that the injury was caused on a vital part. The injury was oozing blood and in the case of excessive bleeding, such a wound could be fatal to the life of the injured. In his opinion, the object, causing the injury in the present case may have had blood stains on it.

10. Taking stock of the aforesaid evidence of the eye-witnesses and of the medical evidence, we are of the view that the evidence cannot be disbelieved in its totality. We have noticed that the version of both the eye-witnesses have been partly disbelieved by the trial Court while acquitting accused Nos.2 and 3. The story given by these witnesses that the accused No.3 came to the spot and gave a blow on the head of the deceased which caused the deceased to fell down, has been disbelieved by the trial Court on the ground that there was no such head injury found on the head of the deceased Siddappa. Similar story relating to the involvement of the accused No.2 has also not found favour with the trial Court resulting in the acquittal of accused No.2 also of all the charges. That leaves us with the version of these two witnesses vis-a-vis accused No.1. We find the evidence of these witnesses vis-a-vis the overt act stated to have been committed by the accused No.1 to be consistent. The said evidence is

corroborated by the medical evidence concerning the injury suffered by the deceased. The question, however, arises as to what would be the offence stated to have been committed by the accused.

11. On a plain reading of the story given by the two eye-witnesses, it is clear that the offence took place on the spur of the moment. There was no premeditation in the sense that the entire incident was not preplanned. It is nobody's case that there was any conspiracy between the accused. Considering the prosecution version itself, it is clear that initially the scuffle started because of the aggressive behaviour of the deceased Siddappa. Siddappa had called upon the accused No.2 to remove the wooden rafter of his house and admittedly when the wooden rafter from the roof of his house was not removed by the accused No.2, the deceased Siddappa took the law into his own hands and forcibly pulled down the rafter from the house of the accused No.2. Admittedly, this aggravated the situation and resulted in a physical fight between the deceased and the accused No.2. We find from the evidence that the accused No.2 has suffered a bleeding injury on his head. The question then arises as to whether any right of private defence could have been said to have been accrued to the accused No.2 and as to whether the accused No.1 would have any right to defend the body of

his brother accused No.2. As far as the prosecution witnesses are concerned, PW-2 Siddamma is completely silent about the manner in which the injury was caused to the head of accused No.2. She candidly admits that she did not know how this injury was caused. PW-3 Ramnama has, however, given an explanation. She states that after the incident, accused No.2 Jatashankar suffered a head injury while entering into his house. She states that this injury was suffered by him because his head hit the wooden frame of the door of his house. In the state of the evidence before us, we find it very difficult to accept this version. It must be remembered that PW-2 Siddamma in her evidence categorically stated that after the incident, all the accused ran away from the spot. She does not even depose about accused No.2 having entered his house which is the version given by PW-3 Ramnama. Normally speaking, it would be difficult to accept that a person can hurt his head in this manner causing a bleeding wound by dashing against the door frame of his own house. The prosecution has not bothered to get on record during the investigation the exact height of the accused or of the door of his house against which he is supposed to have dashed his head. Be that as it may, the prosecution has also not taken any scraping from the wooden frame of this door where the accused No.2 is said to have suffered this injury. On the other hand, the defence version was that the

deceased caused the injury on the head of accused No.2 with the help of a broken rafter from the roof of the house of the accused No.2. We find from the record that this rafter was seized by the police and was article 3 before the Court. From the evidence of the panch it appears that the rafter had two nails on the same. We have examined the rafter and seen the nails. It would have been proper for the investigating officer to have sent this rafter to the chemical analyser to find out if any blood stains were there on the same. This also does not appear to have been done in the present case. In the admitted background of this case, that the deceased was the aggressor who started this entire incident and even pulled down the rafter from the roof of the house of the accused No.2, the possibility of the deceased causing a blow by the said rafter on the head of the accused No.2 cannot be ruled out and seems to be more probable than the accused No.2 suffering this injury while entering the door of his own house. It cannot be lost sight of that while proving its defence, the burden is lighter and it would be sufficient if the defence is proved beyond the preponderance of possibility. For doing so, the defence can rely upon the circumstances in its favour from the prosecution evidence as also the lacunae in the prosecution evidence which could come in aid of the defence to establish the truthfulness of the defence version. From the discussion of the aforesaid

evidence, we find rather difficult and improper to completely exclude the possibility of the deceased causing a bleeding injury on the head of the accused No.2.

12. It appears from the prosecution evidence that the accused No.1 was in fact in the house of the accused No.2 and he rushed out only on hearing the scuffle. Even assuming that he saw the bleeding injury on the head of his brother the accused No.2, the question still survives as to whether he had a right to kill the deceased by a knife blow. It was the contention on behalf of the prosecution that no such right could be said to be existing in favour of accused No.1 because according to the evidence of the witnesses, prior to giving of the knife blow, the accused No.3 had already assaulted the deceased on the head as a result of which the deceased had fallen down supine on the ground in a helpless condition. It was contended that once the deceased had already been overpowered by a blow given by the accused No.3 on his head, no right of self-defence could be said to accrue to the accused No.1. The arguments made by the learned A.P.P. is attractive at first blush but cannot stand further scrutiny. Unfortunately for the prosecution, it appears that this version of the eye-witnesses about the accused No.3 giving a blow with the rafter on the head of the

deceased has been disbelieved by the trial Court. This version has been disbelieved because there is no such corresponding injury on the head of the deceased. There is no appeal against the acquittal filed by the State against the acquittal of the accused Nos.2 and 3. In the circumstances, when the overt act said to have been committed by the accused No.3 has been disbelieved, the consequence of the said act i.e. the deceased falling on the ground also cannot be believed. It appears that the incident of actual assault occurred in a flash. The accused No.1 appears to have come to the defence of his brother and on his arrival must have been confronted not only by the deceased, probably armed with a wooden rafter, but also the two ladies from his house. We have noted that he has not repeated the assault and there is only a single blow. Be that as it may, even assuming that there was a right accrued in his favour to defend the body of his brother i.e. the accused No.2, in our view even a single blow given with such force must be said to have been given with the object of defending his brother's body but also with the intention to commit injury which was likely to cause death.

13. In our view, even assuming that the right of private defence in respect of his brother's body accrued to the accused No.1, in the light of the medical evidence which indicates that there was no fracture of

the skull of the accused No.2, it would be difficult to hold that there was reason for the accused No.1 to apprehend that grievous hurt to the accused No.2 could have been caused as a consequence of the injury suffered by him. It appears that he has come on the scene and immediately given one deadly blow on the chest of the deceased on seeing his brother bleeding from the head.

14. We find that taking an over all view of the evidence on record, this is a case that would fall within exception sub-section (2) of Section 300. It appears that the accused No.1 has clearly exceeded the right of self-defence conferred upon him by law and has caused the death of a person, albeit without premeditation. The fact that he gave only one blow in the heat of the moment would, according to us, indicate that he perhaps had no intention of doing more harm than was necessary for the purpose of such defence. Having said so, we feel that this would be a case that can fall within Section 304 Part-II. In the facts and circumstances of the case, the proper conviction would be for an offence punishable under Section 304 Part-II of the IPC.

15. In the result, we partly allow this appeal. We set aside the conviction imposed by the trial Court and convict the appellant/original accused No.1 for an

offence under Section 304 Part-II of the Indian Penal Code. He is sentenced to undergo R.I. for a period of five years and to pay a fine of Rs.5,000/-, in default to suffer further R.I. for a period of three months. The bail bond of the appellant stands cancelled and he is directed to surrender forthwith. Needless to say that the appellant will be entitled to set-off in respect of the sentence already undergone.

(R.M.S. KHANDEPARKAR, J.)

(R.S. MOHITE, J.)